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**Supreme Court of the United States**

OCTOBER TERM, 1944

No. 421 ✓

ARSENAL BUILDING CORPORATION and SPEAR & Co., Inc.,

*Petitioners,*

VS.

MEYER GREENBERG, suing in behalf of himself and other  
employees and former employees of defendants  
similarly situated,

*Respondent.*

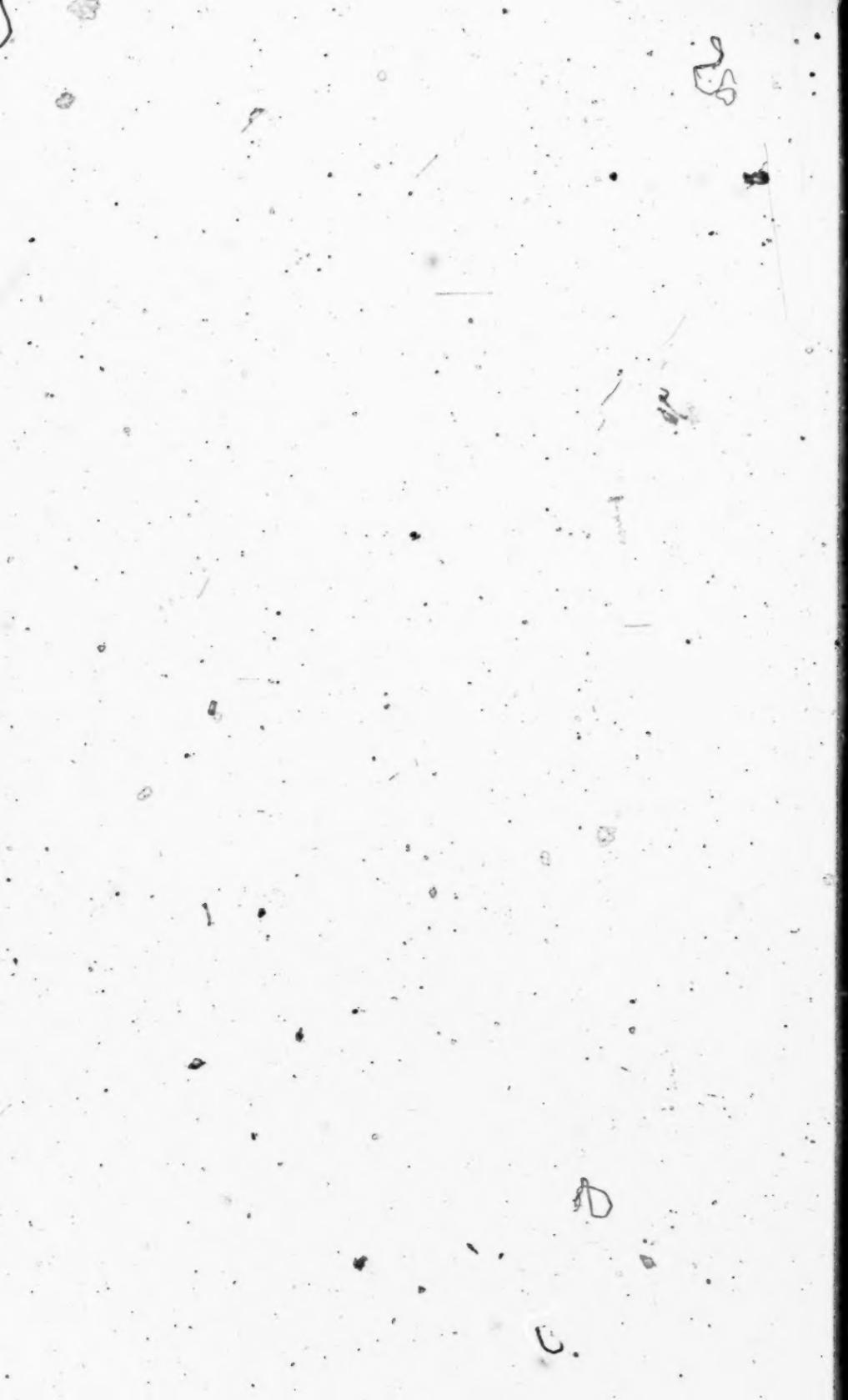
**BRIEF FOR RESPONDENT**

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT  
COURT OF APPEALS FOR THE SECOND CIRCUIT

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# Supreme Court of the United States

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vs.

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*Respondent.*

No. 421

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT  
COURT OF APPEALS FOR THE SECOND CIRCUIT

## BRIEF FOR RESPONDENT

### Opinions Below.

The opinion of the United States District Court for the Southern District of New York is reported in 50 F. Supp. 700. The opinion of the Circuit Court of Appeals for the Second Circuit is reported in 144 F. (2d) 292.

### Jurisdiction.

The judgment of the Circuit Court of Appeals for the Second Circuit which petitioners seek to have reviewed was filed on August 10, 1944 (R. 482). The petition for writ of certiorari was filed on September 1, 1944 and was granted by order of this Court filed November 6, 1944, limited to question (h) presented by the petition (R. 483).

Petitioners have invoked jurisdiction of this Court under Section 240 (a) of the Judicial Code, 28 U. S. C. § 347, as amended by the Act of February 13, 1925.

### Statement.

The statement of the prior proceedings in this case has been adequately set forth in petitioners' brief and need not be here repeated (Pet. Br. pp. 4-6).\*

### Statutory Provisions Involved.

The pertinent statutory provisions in question are Section 16 (b) of the Fair Labor Standards Act of 1938, 29 U. S. C. § 216 (b), and Section 480 of the New York Civil Practice Act, which have been set forth in full text in petitioners' brief (Pet. Br. p. 3). (See Appendix.)

### The Issue Presented.

The sole question upon which certiorari has been accepted here was stated as follows in the petition (Pet. for Writ p. 12):

(h) Whether Section 16 (b) of the Act in providing for liquidated damages in an additional amount equal to unpaid minimum wages or unpaid overtime compensation under Sections 6 and 7 of the Act and also in allowing a reasonable attorneys' fee and costs of the action, did not establish a uniform and exclusive measure of recovery under the Act and thereby preclude the allowance of any additional recovery of interest under State law, in this case Section 480 of the New York Civil Practice Act.

### Summary of Argument.

Petitioners have urged that the express language of Section 16 (b) of the Fair Labor Standards Act is subject to the construction that Congress consciously formulated

\* Of course respondent does not accept as relevant the findings set out in the statement which obviously have no bearing upon the question of interest and the right to its recovery (compare Pet. Br. p. 6).

lated a definite and exclusive measure of recovery for employees' suits brought under the statute in terms precluding the right to interest although otherwise recoverable under state law. Accordingly, petitioners assign error in the order of the lower Court amending *nunc pro tunc* the judgment as originally entered so as to provide for the addition of "average interest" upon the amounts of unpaid overtime and liquidated damages recovered by plaintiff in behalf of himself and his fellow employees.

Respondent's position is that the question of the right to interest here is a matter of local law in which the decision of the highest court of the State of New York was entitled to complete respect. This is certainly so unless there is some inherent conflict between the intention of Congress as expressed in the language of the statute and the interest provision of the New York Civil Practice Act. In any event, even if the interest question here is one of federal rather than state law, the federal courts will nevertheless customarily tend to accept the provision of local law which would otherwise pertain as indicating a "suitable" rule or rate. The lower court in this case having accepted the local law and adopted the local rate as suit-

\* The principle of "average interest" is merely a simple mathematical formula for computing with reasonable certainty the amount of interest owing in a case where, as here, the total amount due is made up of a cumulating liability which attaches week by week at the termination of each pay period upon failure of timely payment of wages under the statute. The amount due a particular plaintiff varies progressively upward with continuing violation.

To avoid a separate computation based upon the cumulated total due each week during a period of several years of employment, as here, the formula used is: Take the entire gross amount due in wages and damages for the overall period in question and halve it to obtain the *average* amount due; determine the midpoint date in the period of employment in question, that is to say, obtain an *average* period of time for which interest is to be computed; compute interest at the full legal rate (here 6% under Section 480 of the New York Civil Practice Act) upon the *average* sum due from the midpoint date to the date of termination of employment; add interest at the full legal rate upon the gross amount due from the date of termination of employment to the date of entry of judgment. This method was first suggested by the referee in *Emerson v. Mary Lincoln Candies*, 174 Misc. 353, afid. 261 App. Div. 879, 287 N. Y. 577.

An affidavit in support of the motion to add interest described the "average" method of computation as a "reasonable basis", and one "without prejudice to the defendants" (R. 460). No affidavit was submitted in opposition.

able, the result is not to be disturbed here in the absence of an apparent conflict with a clearly enunciated policy of Congress or the Constitution.

## ARGUMENT

### I.

**The question of interest is a matter of local law in which the decision of the highest court of New York was entitled to complete respect.**

Controlling decisions of the courts of the State of New York interpreting and applying Section 480 of the New York Civil Practice Act have long considered the provision that "interest 'shall be added to the total sum awarded'" in all suits upon contract, express or implied, resulting in the recovery of damages, whether liquidated or unliquidated, as a mandatory expression of the legislative will absolutely binding in all such suits.\* In the light of this fact and of the further fact that "the liability for liquidated damages under the Fair Labor Standards Act is contractual in character" [*Overnight Motor Transp. Co. v. Missel*, 316 U. S. 572, 582; *Northwestern Yeast Co. v. Brautin*, 133 F. (2d) 628], the New York Court of Appeals in *Fitzgerald Construction Co. v. Pedersen*, No. 462 for argument with the case at bar, held that plaintiffs in an action under the Act are "entitled to interest on the whole of their recovery, including the liquidated damages." See 293 N. Y. 126. See also *Rigopoulos v. Kerran*, 53 F. Supp. 829 (S. D. N. Y. 1943).

Established by authoritative decisions here is the principle that the question of interest "is always one of local law." *Holden v. Freedman's Savings & Trust Co.*, 100 U. S. 72; *Ohio v. Frank*, 103 U. S. 697; *Massachusetts*

\* *Mayaguez Drug Co. v. G. & R. F. Ins. Co.*, 260 N. Y. 356; *McLaughlin v. Brinckerhoff*, 222 App. Div. 458; *Joannes Bros. Co. v. Lamborn*, 226 App. Div. 777; *Newburgh Dress Co. v. Nadler & Nadler, Inc.*, 251 App. Div. 330; *Greater N. Y. Coal & Oil Corp. v. Philadelphia Coal Distributing Co., Inc.*, 252 App. Div. 883.

*Benefit Assn. v. Miles*, 137 U. S. 689. Compare *Klaxon v. Stentor Elec. Mfg. Co.*, 313 U. S. 487, 496-7; *Funkhouser v. J. B. Preston Co.*, 290 U. S. 163, 167. See also Note, 44 Harvard Law Review 105 (1930), "Interest Rates in the Federal Courts," page 106.

Thus Chief Justice HUGHES, in *Funkhouser v. J. B. Preston Co.*, in construing Section 480, observed that:

The statute in question concerns the remedy and does not disturb the obligations of the contract.

And while *Klaxon v. Stentor Elec. Mfg. Co.* was a diversity case; in which the Court was applying the principle of *Erie R. R. v. Tomkins*, 304 U. S. 64, the reasoning of Mr. Justice REED there is not inappropriate here:

Whatever lack of uniformity this (application of the rule of *Erie R. R. Co. v. Tomkins*) may produce between federal courts in different states is attributable to our federal system, which leaves to a state, within the limits permitted by the Constitution, the right to pursue local policies diverging from those of its neighbors. It is not for the federal courts to thwart such local policies by enforcing an independent "general law" of conflict of laws. \*\*\*

Here, however, Section 480 of the New York Civil Practice Act is in no way related to the validity of the contract in suit, but merely to an incidental item of damages, interest, with respect to which courts at the forum have commonly been free to apply their own or some other law, as they see fit.

To like effect see *Ferguson v. Union Nat. Bk.*, 126 F. (2d) 753, 759 (C. C. A. 4, 1942).

Further, the "proper function" of the federal court is "to ascertain what the state law is, not what it ought to be" (313 U. S. 487, 497); and this is certainly true unless there is some inherent conflict between the intention of Congress as expressed in the language of the statute conferring the right sued upon and the remedial provision of the law of the forum assigning the appropriate rule and

measure of interest to the recovery. See the provision of the Federal Conformity Act, 28 U. S. C. § 725, declaring local state laws applicable as "rules of decision" in the federal courts except where the Constitution or federal statutes may "otherwise require or provide." In the light of the Conformity Act, "the federal courts have gone far in construing state decisions as constructions of local statutes and hence controlling as 'rules of decision'" [44 Harvard Law Review 105, 106 (1930)]. And compare what was said in this Court in *Massachusetts Benefit Assn. v. Miles* about the necessity that "the courts of the state and the federal courts sitting within the state should be in harmony" upon questions of this character.

As will appear hereafter, there is no apparent Congressional intention expressed in the language of Section 16 (b) of the Fair Labor Standards Act to withhold recovery of interest which would otherwise pertain under applicable provisions of local law from an employee who has recovered under the federal statute. Neither the Court of Appeals of New York nor the Second Circuit found conflict between the measure of recovery accorded by Congress to affected employees under Section 16 (b) of the federal Act and the addition of interest to the recovery as prescribed under the prevailing local law.\*

\* Nor was the conflict urged by petitioners noted by the numerous courts permitting recovery of interest pursuant to § 480 in actions under Section 16(b) of the Fair Labor Standards Act. See *Emerson v. Mary Lincoln Candies*, 174 Misc. 353, 356, 20 N. Y. Supp. (2d) 570 (Sup. Ct. N. Y., Erie Co. 1940), affd. 261 App. Div. 879, 287 N. Y. 577; *O'Neil v. Brooklyn Savings Bank*, 180 Misc. 542, 43 N. Y. Supp. (2d) 25 (App. Term Sup. Ct. N. Y. 1st Dept. 1943), affd. 267 App. Div. 317, 293 N. Y. 666; *Doyle v. Johnson Bros. Inc.*, N. Y. Law Journal, Feb. 13, 1943 (App. Term Sup. Ct. N. Y. 2nd Dept. 1943) modifying and affirming *Doyle v. Johnson Bros. Inc.*, N. Y. Law Journal, July 9, 1942 (City Ct., N. Y. C., Kings Co. 1942); *Campbell v. Mandel Auto Parts Corp.*, N. Y. Law Journal, Apr. 27, 1943, 6 Wage Hour Rept. 435 (Sup. Ct. N. Y. N. Y. Co. 1943); *Schineck v. 386 Fourth Ave. Corp.*, 182 Misc. 1037 (City Ct., N. Y. C., N. Y. Co. 1944); *Asaro v. Lilienfeld*, 36 N. Y. Supp. (2d) 802 (City Ct., N. Y. C., N. Y. Co. 1942); *Schanck v. Lehigh Valley R. R. Co.*, N. Y. Law Journal, March 11, 1944 (City Ct., N. Y. C., N. Y. Co. 1944). See also *Rigopoulos v. Kervan*, 53 F. Supp. 829 (S. D. N. Y. 1943); *Clarke v. 126 Fifth Ave. Corp.*, 7 Wage Hour Rept. 427, 8 Labor Cases par. 62,084 (S. D. N. Y. 1944); *Schmidt v. Emigrant Bank*, 7 Wage Hour Rept. 623, 8 Labor Cases par. 62,269 (S. D. N. Y. 1944). Contrary is *Berry v. 34 Irving Place Corp.*, 7 Wage Hour Rept. 682, 8 Labor Cases par. 62,265 (S. D. N. Y. 1944).

It follows that the local law of New York as to interest, followed by the trial judge here, was entitled to complete respect.

## II.

**Even if the interest question was one of federal rather than state law, the lower court properly accepted the local law as suitable and the result should not be disturbed.**

Even in the event the interest question here is to be deemed one of federal rather than state law, the trial court properly accepted the provision of local law as a satisfactory rule or rate with regard to interest. See *Board of Commissioners of Jackson County v. U. S.*, 308 U. S. 343, 352; *Royal Indemnity Co. v. U. S.*, 313 U. S. 289, 296-297.

While there has been some inclination in recent decisions to follow the rule indicated by state law in federal cases not founded upon a diversity of citizenship rather because the state rule was deemed suitable for adoption as the applicable federal rule in the circumstances than because of any preliminary determination that state law applied, either rationale would lead to the same result here. Thus, in *Royal Indemnity Co. v. U. S.*, this Court observed:

But the rule governing the interest to be recovered as damages for delayed payment of a contractual obligation to the United States is not controlled by state statute or local common law. In the absence of an applicable federal statute it is for the federal courts to determine, according to their own criteria, the appropriate measure of damage, expressed in terms of interest, for nonpayment of the amount found to be due.

Nevertheless, the Court followed the local law as indicating a rule satisfactory for federal adoption, and ended by

applying the 6% rate provided by the New York law as to interest, observing:

We think that in the circumstances of this case a suitable rate is that prevailing in the state where the obligation was given and to be performed.

Founded upon similar reasoning was the decision in *Board of Commissioners of Jackson County v. U. S.* where this Court noted:

With reference to other federal rights the state law has been observed, as it were, as the governing federal rule not because state law was the source of the right but because recognition of state interests was not deemed inconsistent with federal policy.

The trial court in this case having, with the Second Circuit's affirmation, accepted the local law and the local rate as suitable, the result should not be disturbed in the absence of definite conflict with a clearly enunciated policy of Congress. Defendant assumes to find in the language of Section 16 (b) of the Fair Labor Standards Act an expression of "Congressional intention to exclude interest" in employees' suits under the statute (Pet. Br. p. 15), and thus fancies a conflict in which the state rule must fail. But the mere absence of reference to interest in Section 16. (b) is indicative of no Congressional intention to legislate its exclusion. The displacement of local statutory law will not be founded on mere inference. The principle was recently reiterated in *H. P. Welch Co. v. New Hampshire*, 306 U. S. 79, 85:

Its (Congressional) purpose to displace the local law must be definitely expressed. *Mintz v. Baldwin*, 289 U. S. 346, 350, 77 L. ed. 1245, 1249, 53 S. Ct. 611. The rule applicable is clearly stated in *Illinois C. R. Co. v. State Pub. Utilities Commission*, 245 U. S. 493, 510, 62 L. ed. 425, 438, 38 S. Ct. 170, P. U. R. 1918C, 279: "In construing federal statutes enacted under the power conferred by the commerce

clause of the Constitution . . . it should never be held that Congress intends to supersede or suspend the exercise of the reserved powers of a State, even where that may be done, unless, and except so far as, its purpose to do so is clearly manifested."

See also *Savage v. Jones*, 225 U. S. 501, 533.

The principle is further underlined by the exact language of the Conformity Act, which indicates that the state rule is to apply except where the Constitution or federal statutes may "otherwise require or provide." 28 U. S. C. § 725. The positive character of the words "require" and "provide" would seem to preclude the founding of an exception upon mere inference, or omission of mention. To argue from the absence of mention that Congress intended to fill up the field is to set up a principle in conflict with fundamental federal policy in all cases in the federal courts, no matter what the question involved, contrary to the fair intendment of the Conformity Act. Compare *Erie Railroad v. Tomkins*, 304 U. S. 64. The need for conforming state and federal law as applied to a particular problem in all cases arising within the territorial limits of the same state is the more pressing where there is involved a right of maintaining suit "in any court of competent jurisdiction," both state and federal. See 29 U. S. C. § 216 (B).\*

Further, petitioner has conceded, "Congress did not seek to control the amount of fees and costs, but knowing

\* If inferences are to be drawn from the language of Section 16 (b) of the Fair Labor Standards Act, it is perhaps significant that Congress, after providing for the recovery of unpaid minimum wages or overtime together with an additional equal amount as liquidated damages, added: "Action to recover such liability may be maintained in any court of competent jurisdiction . . ." It was thus contemplated that both federal and state courts would have concurrent jurisdiction of employees' suits and if such actions were to be "maintained" in the state courts, obviously a mere detail of local law which "only incidentally affects the remedy for enforcing that responsibility" [*M. K. & T. R. R. Co. v. Harris*, 234 U. S. 412, 421] established by the federal statute was to remain fully effective for the benefit of those by whom the action might be "maintained" in the state court. Such an incidental detail is the matter of interest. Compare Poole, "Private Litigation Under the Wage and Hour Act," 14 Miss. L. J. 157, 159-161.

these are matters of procedure which state courts having concurrent jurisdiction could wholly deny, Congress protected employees by specifically requiring such allowances" (Pet. Br. p. 15). But, if this be true, the omission to mention interest would appear to indicate an even stronger Congressional intention to leave the matter entirely to disposition according to state law.

Petitioners' argument that the Fair Labor Standards Act establishes a uniform and exclusive measure of recovery which precludes an award of interest under the state law (Pet. Br. p. 8 ff.) is founded upon various dicta in *Campbell v. Zavelo*, 243 Ala. 361, 366, 10 So. (2d) 29; *Murmann v. N. Y., N. H. & H. R. R. Co.*, 258 N. Y. 447; *Louisiana & Arkansas R. R. Co. v. Pratt*, 142 F. (2d) 847 (Pet. Br. pp. 9, 15-18), all of which are likewise distinguishable.\* Decisions of this Court indicate a con-

\* (1) The holding in *Campbell v. Zavelo* was the purest dictum. The court there reversed a judgment for defendant upon the merits and remanded for further proceedings; there was thus no question of interest passed upon by the lower court before the appellate court. Furthermore, the appellate court stated that "the amount sought is not within our statute and decisions providing for interest on failure of payment of contract price." Accordingly, the state law could not apply in any event.

(2) In *Murmann v. N. Y., N. H. & H. R. R. Co.*, a widow sued under the Federal Employers Liability Act to recover damages for the death of her husband. The case involved consideration not of Section 480 of the New York Civil Practice Act, which is limited to contract cases, but of Section 132 of the Decedent Estate Law of New York. Referring to the latter provision, which permitted interest in a suit for wrongful death of decedent, the New York Court of Appeals noted that the suit had been brought *not* under Sections 130 and 131 of the Decedent Estate Law, which the interest provision was designed to implement, but under the Federal Employers Liability Act; and the court concluded: "Section 132 of the Decedent Estate Law does not extend to cases brought under the federal statute. The Legislature (of New York State) had no intention to make it reach so far."

(3) *La. & Ark. Ry. Co. v. Pratt* contains conflicting and inconstant rationale. Nor can the decision be reconciled with the statement in the opinion that: "State and federal courts exercise concurrent jurisdiction over causes arising under the Federal Employers' Liability Act; interest is essentially a question of local law; and, for purposes of harmony and uniformity of administration, state statutes relating to interest should be applied whenever it is practicable to do so" [142 F. (2d) 847, 850; and compare discussion under the first point of the argument above]. The answer lies in the words of Mr. Justice HOLMES in *Dickenson v. Stiles*, 246 U. S. 631, 633: "Coming to the merits, cases that declare that the acts of Congress supersede all state legislation on the subject of the liability of railroad companies to their employees have nothing to do with the matter. The Minnesota statute does not meddle with that \* \* \*. It (Congress) contemplated suits in state courts and accepted state procedure in advance \* \* \* we see no reason why it should be supposed to have excluded ordinary incidents of state procedure."

trary result. In *Massachusetts Benefit Assn. v. Miles*, 137 U. S. 689, it was urged that the provision for interest from judgment date in the federal statute (Rev. Stat. § 966) precluded recovery of interest prior to judgment although allowable under state law. Despite this objection, the Court held:

Section 966, while providing only for interest upon judgments, does not exclude the idea of power in the several states to allow interest upon verdicts, and where such allowance is expressly made by a state statute, we consider it a right given to a successful plaintiff, of which he ought not to be deprived. \* \* \* The courts of the state and the federal courts sitting within the State should be in harmony upon this point.

Compare *Sioux County v. National Surety Co.*, 276 U. S. 238, 243.

Indicating a similar result is *Missouri K. & T. Railway Co. v. Harris*, 234 U. S. 412, 421, where a state law permitting recovery of a reasonable attorney's fee by a successful litigant in suits of various enumerated types, including claim for loss or damage to freight in transit, was held not inconsistent with a provision of federal statute establishing a right of action for goods lost or damaged while in interstate transit but making no mention of attorney's fees and costs. As was there noted:

\* \* \* it has been held in a series of recent cases, that the special regulations and policies of particular states upon the subject of the carrier's liability for lost or damaged interstate shipments, and the contracts of carriers with respect thereto, have been superseded (by the federal law).

But the Texas statute now under consideration does not in any wise either enlarge or limit the responsibility for the loss of property intrusted to it in transportation, and only incidentally affects the

remedy for enforcing that responsibility. • • • it imposes not a penalty, but a compensatory allowance for the expense of employing an attorney. • • • In fact and effect, it merely authorizes a moderate increment of the recoverable costs of suit in the large class of cases that are within its sweep, among which are incidentally included claims for freight lost or damaged in interstate commerce.

And the Court concluded, distinguishing *Atlantic Coast Line R. R. Co. v. Riverside Mills*, 219 U. S. 186, that the mere omission of the federal statute regulating interstate commerce to authorize allowance of counsel fee was no indication "that it is not permissible for a state, as a part of its local procedure, to permit the allowance of a reasonable attorney's fee, under proper restrictions"; on the contrary, the "local statute, as already pointed out, does not at all affect the ground of recovery or the measure of recovery; it deals only with a question of costs, respecting which Congress has not spoken" (234 U. S. 412, 421-422).

Similarly, it has been held that in a shipper's action against a carrier in a federal court to recover reparation for excessive freight charges under Section 16 of the Interstate Commerce Act, interest as provided for by state law may be properly added to the amount of the award. This result was reached notwithstanding the absence from Section 16 of any provision for interest. *Louisville & N. R. R. Co. v. Sloss-Sheffield Steel & Iron Co.*, 269 U. S. 217, 240; compare 49 U. S. C. § 16. To like effect is *Ferguson v. Union National Bank*, 126 F. (2d) 753, 759 (C. C. A. 4, 1942) where recovery of interest was allowed in conformity with state law in suit by a bank against the National Housing Administrator, although the statutory provision from which the right of suit was derived made no mention of interest. Compare 12 U. S. C. §§ 1702-1703.

Nor is it objectionable that Congress provided for

"liquidated damages" and that, if the state law as to interest is to be applied, an additional item of recovery will be added to the damages accorded by Congress (compare Pet. Br. pp. 13-16). The "liquidated damages" awarded under Section 16 (b) of the Act are but a part of wages, that is to say, a portion of the contract recovery itself. *Overnight Motor Transp. Co. v. Missel*, 316 U. S. 572, 583; *Northwestern Yeast Co. v. Broutin*, 133 F. (2d) 628 (C. C. A. 6, 1942). Under the circumstances, there can be no valid objection to an award of interest upon a sum which consists merely of a full measure of liquidated contract recovery.\* Further, computation of interest upon an aggregate sum recovered including liquidated damages is not a compounding; but even if it were, this Court has

\* In arguing that provision in Section 16 (b) of the Fair Labor Standards Act for "liquidated damages" was intended to preclude recovery of interest petitioners have ignored the essential distinction between damages and interest. Thus, liquidated damages merely restore to the underpaid workman equivalent wages taking into consideration the delay in payment; and the whole is "compensation" for "damages" which might otherwise be "too obscure and difficult of proof for estimate other than by liquidated damages" (*Overnight v. Missel*, 316 U. S. 581, 583). The need for timely payment of wages to the workingman or, upon failure of timely payment, for compensatory damages to insure restoration of his "real wage" position in view of constant change in the value of what his money can buy and in view of the hardship, even the want and privation, which delayed payment each week may occasion, has frequently been the subject of comment by both judges and economists. See *Morehead v. New York*, 298 U. S. 587, 635; Report of Committee on Wage Collection (1936), Bulletin No. 629, United States Department of Labor, Bureau of Labor Statistics, p. 139; Commons and Andrews, "Principles of Labor Legislation" (1936), p. 330.

Thus, it has been uniformly held that the rigid requirements of the Fair Labor Standards Act can be satisfied only by prompt payment of the overtime wages as currently earned in the regular course of employment or, in default thereof, by payment of back wages together with equivalent liquidated damages. *Seneca Coal & Coke Co. v. Lofton*, 136 F. (2d) 359 (C. C. A. 10, 1943), cert. den. 320 U. S. 772 (1943); *Rigopoulos v. Kervan*, 140 F. (2d) 506 (C. C. A. 2, 1943); *George Lawley & Son Corp. v. South*, 140 F. (2d) 439, 442 (C. C. A. 1, 1944); *Birbalas v. Cuneo Printing Industries*, 140 F. (2d) 826 (C. C. A. 7, 1944); *Culver v. Bell & Lofland*, 7 Wage Hour Rept. 1190, 8 Labor Cases (C. C. H.) par. 62,443 (C. C. A. 9, 1944); *Atlantic Co. v. Broughton*, 7 Wage Hour Rept. 1176, 8 Labor Cases (C. C. H.) par. 62,435 (C. C. A. 5, 1944).

Interest on the other hand is compensation for use by another of a specific sum of money, in this case a fully liquidated amount including both unpaid wages and statutory "liquidated damages." Further, it reflects the local legislature's determination as to the loan or use value of money in a particular locale, a matter best left to state law. Compare the purpose of provision for attorney's fees and costs in Section 16 (b), "so that employees will not suffer the burden of an expensive lawsuit" (83 Cong. Rec. 9264, cited in Pet. Br. p. 10).

indicated that the result is not invalid nor one which the courts need strain to avoid. See *Royal Indemnity Co. v. U. S.*, 313 U. S. 289, 295; *L. & N. R. R. Co. v. Sloss-Sheffield Co.*, 269 U. S. 217, 240.

Finally, petitioners have urged that to permit the federal court to follow state law and add interest to the damages provided for in Section 16 (b) is to create a lack of uniformity which is best avoided by disallowing interest entirely (Pet. Br. p. 17). But the fact is that "it is apparent, from a survey of the decisions, that the trend is toward conformity even where it is not obligatory. This result entails little sacrifice on the score of uniformity in the light of the tendency of the states to prescribe substantially similar rates of interest." See 44 Harvard Law Review 105, 108 (1930).\* In any event "whatever lack of uniformity this (result) may produce between federal courts in different states is attributable to our federal system", and "it is not for the federal courts to thwart local policies" upon that ground. *Klaxon v. Stentor Elec. Mfg. Co.*, 313 U. S. 496. Such differences "are inevitable, as being peculiar to the *forum*." *M. K. & T. R. R. Co. v. Harris*, 234 U. S. 412, 421.

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\* The rates allowed in the various states "range from 5% to 8%" but "a preponderant majority of the statutes award 6%" \* \* \* the next most favored rate is 7% \* \* \* less frequently the legal rate is 8% \* \* \* a few statutes prescribe 5%." See 44 Harvard Law Review 105, 108-109, where all of the statutory interest provisions of the various states have been collated.

## CONCLUSION.

In view of the sentiment of this Court that nothing is "more appropriate than due regard for local institutions and local interests"\*, the judgment of the Circuit Court of Appeals for the Second Circuit should be affirmed in full.

Respectfully submitted,

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\* *Jackson County v. U. S.*, 308 U. S. 343, 351.

## Appendix.

Fair Labor Standards Act of 1938 (Act of June 25, 1938, c. 676, 52 Stat. 1060; 29 U. S. C. Secs. 201 et seq.):

### *Section 16 (b)*

Any employer who violates the provisions of section 6 or section 7 of this Act shall be liable to the employee or employees affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation, as the case may be, and in an additional equal amount as liquidated damages. Action to recover such liability may be maintained in any court of competent jurisdiction by any one or more employees for and in behalf of himself or themselves and other employees similarly situated, or such employee or employees may designate an agent or representative to maintain such action for and in behalf of all employees similarly situated. The court in such action shall, in addition to any judgment awarded to the plaintiff or plaintiffs, allow a reasonable attorney's fee to be paid by the defendant, and costs of the action.

### New York Civil Practice Act

#### *Section 480*

Interest to be included in recovery. Where in any action, except as provided in section four hundred eighty-a, final judgment is rendered for a sum of money awarded by a verdict, report or decision, interest upon the total amount awarded, from the time when the verdict was rendered or the report or decision was made to the time of entering judgment, must be computed by the clerk, added to the total amount awarded, and included in the amount of the judgment. In every action wherein any sum of money shall be awarded by verdict, report or decision upon a cause of action for the enforcement of or based upon breach of performance of a contract, express or implied, interest shall be recovered upon the principal sum whether theretofore liquidated or unliquidated and shall be added to and be a part of the total sum awarded.

